FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 6 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

MYRON G. EHRLICH
401 Third Street, N. W.
Washington, D. C.
(By appointment of the U. S. Court of Appeals)

RICHARD ARENS
c/o Catholic University School of Law
1323 18th Street, N. W.
Washington, D. C.

Counsel for Petitioner

MONROE H. FREEDMAN
DAVID CARLINER
Washington, D. C.
Of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

I.

Contrary to respondent's contention, the consequences of the waiver decision by the Juvenile Court are drastic.

As expressed by the U.S. Court of Appeals for the D.C. Circuit, "treatment as a juvenile is not a statutory bounty which can be withdrawn lightly." *Black* v. *United States*, —— F.2d —— (decided December 8, 1965). To the contrary, a decision to waive is "critically important", entailing far-reaching consequences to a child. *Ibid.* Whether the standard of waiver be viewed as requiring procedures consistent with criminal, civil or administrative due process of law, it was not satisfied in the instant case.

The attention of this Court is invited to the fact that the U.S. Court of Appeals for the D.C. Circuit has held "assistance of counsel in the 'critically important' determination of waiver . . . (to be) essential to the proper administration of juvenile proceedings." *Ibid.* Contrary to respondent's contention, it has gone on to recognize, "that counsel in a waiver proceeding has a 'legitimate interest' in inspecting the juvenile's confidential social file." *Ibid.* It has, significantly subsequent to the decision of this case, viewed the activities of petitioner's counsel in Juvenile Court as illustrating "the need for counsel to develop information relevant to waiver: "On the same afternoon that counsel was retained, he met with the child's mother and the Social Service Director of the Juvenile Court for the purpose of making representations against any possible waiver . . . ; he submitted a memorandum on the question of waiver together with a report from a psychiatrist relating to the child's mental condition; he filed motions with the Juvenile Court asking that appellant be hospitalized, that his social service file be disclosed, and that a hearing be held prior to waiver; he arranged for two psychiatrists and a psychologist to examine appellant in the Receiving Home, and submitted reports of their findings." *Ibid.*

What is clear under the holding of the U.S. Court of Appeals in *Black* is that petitioner had a right to be represented by counsel in the waiver proceedings and that at the least his counsel was erroneously denied access to petitioner's social service file.

Once the right to counsel is conceded in waiver proceedings, the question arises as to whether that right can be meaningfully exercised save by disclosure to counsel of

the social service file. Since the Juvenile Court relied on that file in its waiver decision (Respondent's brief, p. 33) it is clear that counsel could not have discharged his duty without a perusal of that file—any more than counsel could have discharged his duty in any trial court without being in attendance at the taking of any testimony.

Clearly the petitioner was without counsel at the preliminary stages of the waiver proceeding—when petitioner —a 16 year old boy and a victim of mental illness—was subjected to intensive police interrogation. Cf. *Escobedo* v. *Illinois*.

Insofar as petitioner was pronounced mentally incompetent to participate in trial proceedings on his first mental examination in District Court (Letter from D.C. General Hospital to District Court) a serious question arises as to whether he was not equally incompetent and hence without assistance of counsel in all stages of the Juvenile Court proceeding involving consideration of his waiver. This question could not have been resolved without a hearing—and a hearing was denied to the petitioner.*

It is equally clear that inherent within the Juvenile Court's waiver was the determination that petitioner could not respond to the treatment facilities at its disposal. The petitioner offered to prove his amenability to such treatment at a hearing. Surely this was a "factual issue on which live examination and cross-examination would have been helpful". (Respondent's brief, p. 34.)

---

* Fundamental fairness would have prevented the Juvenile Court from waiving jurisdiction over a seriously disordered child, incapable of appreciating the nature of the proceedings. The most plausible inference is that the Juvenile Court proceeded upon the erroneous presumption of petitioner's mental health. See also Appendices.

The petitioner in sum was denied effective assistance of counsel, access to a social service file, essential to counsel's role, and a hearing at which he could have presented his case against waiver—and in consequence juvenile due process in the proceeding below.

II.

The petitioner was further denied his statutory right of "full investigation" by the Juvenile Court.* The defect is patent. Petitioner was arrested in the afternoon or evening of September 5, 1961, and his counsel met with the Social Service Director of the Juvenile Court in the afternoon of September 6, 1961. Counsel promptly secured a psychiatric examination of petitioner and submitted to the Juvenile Court an affidavit of the psychiatrist attesting that petitioner was a victim of severe psychopathology requiring hospital observation in order to have a complete investigation of the psychological and social factors of his case. Petitioner moved the court for hospitalization, disclosure of the Social Service file, and an opportunity to be heard prior to waiver. But the Juvenile Court waived jurisdiction without formally passing upon the motion, without hearing counsel on the motion, and without affording counsel during any part of the proceedings any audience, formal or informal, in chambers or in court.

Petitioner was therefore denied what a "full investigation" requires—disclosure of the considerations weighing with the court and an opportunity to meet them in an open-minded environment. The process of investigation does not mean that the person to be affected by it is to operate in a vacuum. The procedure may not be necessary. But

* 11 D.C. Code 914 [now 11 D.C. Code 1553 (Supp. IV, 1965)].

in some meaningful way opportunity must be afforded to know the information and considerations upon which action is contemplated, to supply additional information, and to urge countervailing considerations.

The point is exemplified by the action of the Securities and Exchange Commission in the handling of securities' registration statements. "So, to prevent unnecessary hardship, an applicant is informed of what the Commission staff regards as deficiencies in a statement and he is allowed to remedy them by amendment. Informal conferences are held with staff members, individual commissioners, and, on occasion, with the full Commission to discuss the adequacy of the statement or amendments. . . . The most useful procedural devices are those which recognize the seriousness of the decision to institute proceedings, and which insure that it shall be made by competent and fair administrators who will give the registrant every opportunity which time permits to present his views to the staff, and, if necessary, to a commissioner or the Commission." Rep. of Atty. Gen. Com. Admin. Proc., S. Doc. No. 8, 77th Cong., 1st Sess., 40 (1941).*

* The procedure before the National Labor Relations Board, in the conduct of an investigation to determine whether to issue a complaint upon an unfair labor practice charge, is to give all parties an opportunity to supply information to substantiate their positions, and to apprise parties of what are deemed to be deficiencies in their positions so as to afford them an opportunity to persuade, explain, or furnish additional substantiating information. If the Regional Director decides not to issue a complaint, his action is appealable to the General Counsel of the National Labor Relations Board, and a further opportunity is provided at that level, by conference and written communication, to persuade, explain, and furnish further information. Even the discretion of the prosecutor in the initiation of criminal proceedings is subject to constitutional limitations. Thus intentional discrimination in the enforcement of an otherwise valid statute may be proved in bar of prosecution. *People* v. *Harris,* 5 Cal. Rept. 852 (1960).

The illegal police inquisition of the child reinforces the totality of circumstances showing lack of a "full investigation." When petitioner was arrested his custody was under the plenary control of the Juvenile Court. D.C. Code Sec. 11-912 (Supp. VIII, 1960). Despite this plenary control, upon petitioner's arrest in the afternoon or evening of September 5, 1961, the Juvenile Court suffered petitioner's subjection to intensive police interrogation until 10:00 p.m. of that day, and during the next day. To be sure the statements made by the child were not offered in evidence. Nonetheless the inquisitorial procedures levelled at petitioner are likely to have tainted subsequent procedures. No reasonable assurances are at hand that independently of the inclusion impermissible materials in hypothetical questions levelled at expert witnesses, the illegal interrogation of the petitioner may not have uncovered other sources of information and the identity of witnesses by whom the case may have been proved without the statement.

The only fair and legal alternative, where the question of waiver has not yet been resolved in favor of retention of jurisdiction, is for the Juvenile Court either to prohibit police questioning of the child or to permit it only after first informing the child of his right to remain silent and to have counsel. Where, as in this case, the Juvenile Court was actively considering waiver, the child was plainly subjected to an illegal inquisition when at the same time the Juvenile Court suffered police interrogation of the child notwithstanding objection of counsel.

The illegal inquisition of petitioner is relevant to and an element of lack of "full investigation." For "full investigation" "obviously means an inquiry not only into the

facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case." *Pee* v. *United States,* 274 F.2d 556, 559. Suffering illegal police interrogation strongly evidences excessive concentration upon "the facts of the alleged offense" to the substantial exclusion of "the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case." It is another element reinforcing the totality of circumstances showing lack of a "full investigation."

In sum, the Juvenile Court not only failed to discharge the duty incumbent upon it as the guardian of child welfare; it failed also to discharge the duty of rational judicial investigation incumbent upon any court.

III.

Respondent suggests (1) that petitioner has passed the age of twenty-one and that reversal of his conviction would render Juvenile Court disposition of his case "questionable", and (2) if this Court were to reverse because the Juvenile Court failed to accord petitioner due process in waiving jurisdiction of him, that a new indictment will have to be based upon 18 U.S.C. 3288. (Respondent's brief, p. 49.)

In reply to the foregoing contentions of the respondent, the petitioner contends that the Juvenile Court retains its original and exclusive jurisdiction of him because it never legally waived same.* No valid indictment can be returned in the District Court in this case under 18 U.S.C. 3288 because of the absence of a legal waiver by the Juvenile

---

* *Johnson* v. *State,* 114 A.2d 1 (N.J. 1955). *People* v. *Oliver,* 134 N.E. 2d 197 (N.Y. 1956).

Court. Surely this section of the Code does not confer jurisdiction.

In any event, the petitioner may be proceeded against in a District of Columbia civil proceeding for commitment of him because of his insanity. See *Lynch* v. *Overholser*, 369 U.S. 705. Whether petitioner should be continued in his present confinement in St. Elizabeths hospital because of his insanity should depend upon further consideration and evaluation of his present mental condition in such a civil proceeding.

Conclusion

By virtue of the foregoing the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

MYRON G. EHRLICH
401 Third Street, N. W.
Washington, D. C.
(By appointment of the
U. S. Court of Appeals)

RICHARD ARENS
c/o Catholic University
School of Law
1323 18th Street, N. W.
Washington, D. C.

Counsel for Petitioner

MONROE H. FREEDMAN
DAVID CARLINER
Washington, D. C.
Of Counsel

APPENDIX 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT BY PETITIONER'S COUNSEL IN DISTRICT COURT

Mark B. Sandground, being duly sworn according to law, deposes and says:

1. I was Petitioner's counsel in the criminal proceedings in District Court.

2. I sought but was denied a hearing in District Court as to the inadequacies of the Juvenile Court proceedings.

3. The Juvenile Court social record made available to me in District Court showed that Petitioner had at no time been examined or treated by a physician at the behest of the Juvenile Court and further contained no diagnosis whatsoever of his condition.

/s/ MARK B. SANDGROUND
Mark B. Sandground

Sworn and subscribed before me, a notary public for and within the District of Columbia this 7th day of December, 1965.

/s/ STUART T. GREENE
My Commission Expires July 14, 1970

CERTIFICATE OF SERVICE

I certify that a copy of this affidavit has been mailed this 7th day of December, 1965 to the Solicitor General of the United States, Washington, D.C.

/s/ RICHARD ARENS
Richard Arens
Counsel for Petitioner
c/o Catholic University
Law School
1323 18th Street, N. W.
Washington, D. C.

APPENDIX 2

PUBLISHED IN THE EVENING STAR

September 8, 1961

"Two years ago, an evaluation of the teen-ager's personality by a Juvenile Court psychologist resulted in an opinion that the youth's responses to tests did not "reflect any serious psychopathology".

Louis Levathes, Judge Ketcham's legal and executive assistant, said the Kent youth was given a battery of "personality tests" in the court's psychological clinic in October, 1959. Court records reveal that the tests indicated the boy was "a sensitive youngster with good personality resources" but with "poor direction and planning."

Court records also noted that he had grown up, with his mother and sister, in a broken home.

The teen-ager was placed on probation for the first time in April, 1959, after police accused him of four housebreakings and an attempted purse-snatching.

His attitude at the time, court aides disclosed, was straight-forward and apparently penitent.

The youth appeared before Judge Ketcham again on December 7, 1959. He was accused of snatching a woman's pocketbook from an auto seat. Court officials said he admitted the charge.

Excelled in School

On that occasion, the youth's indefinite probation was cancelled and he was placed on probation until his 18th birthday. The court declared that his adjustment, follow-

ing the first offense, had been good and that he had excelled in school.

Three months later, in March, 1960, he was back in court. He had been arrested by police on a disorderly conduct charge after a 19-year-girl reported to police he was peeping in a window of her home.

The charge was not pressed by the court's director of social work, according to Mr. Levathes. Court aides again noted the boy's promising adjustment.

Court records also indicated that he was punctual and regular in his probation report appointments. In addition, it was noted that he had been elected president of his eighth-grade class at junior high, had been elected a school marshall and was named as a Junior Red Cross delegate-alternate.